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FEDERAL MEDIATION AND CONCILIATION SERVICE

29 CFR Part 1401

RIN 3076-AA06

Freedom of Information Act Regulations

AGENCY: Federal Mediation and Conciliation Service.

ACTION: Final rule.

SUMMARY: This final rule amends the Federal Mediation and Conciliation Service (FMCS) rules relating to the Freedom of Information Act (FOIA). The final rule revisions include a new response time for FOIA requests, procedures for requesting expedited processing, the availability of certain public information on FMCS's web site, and express inclusion of electronic records and automated searches along with paper records and manual searches. In addition, FMCS's final rule updates its fee schedule. FMCS is also updating the names and addresses of the various offices within the agency responsible for FOIA related activities.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION DATE IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: FMCS amends its regulations at 29 CFR Part 1401, Subpart B under FOIA, 5 U.S.C. 552. The primary focus of these amendments is

to effectuate for this Agency various provisions under the 1996 Electronic FOIA Amendments, Public Law No. 104-231. Significant new provisions implementing the amendments are found at § 1401.21(c) (electronic reading room), (d) (pamphlets distribution), (e) (records disposition), § 1401.22 (deletion marking), § 1401.34(a), (b), (c), (d) (timing of responses), § 1401.34 (d) (volume estimation), § 1401.36(a) (definitions), (b) (fee schedules, lack of fees, fee waivers).

Revisions to the FMCS fee schedule can be found at § 1401.36(b)(1)(i), (ii), (iv), and (b)(3)(v). The duplication charge remains the same at twenty cents per page, while document search and review charges will increase to \$4.00 per each quarter hour or portion thereof for clerical time and \$10.00 per each quarter hour or portion thereof for professional time. The amount at or below which the Service will not charge a fee will decrease from \$50.00 to \$14.00.

Sections 1401.24 and 1401.37 are being removed because they are neither required by law nor necessary to interpret the law.

Background

On August 3, 2007, FMCS published a Notice of Proposed Rulemaking (NPRM) proposing changes to its rule relating to FOIA procedures and updating its fee schedule. FMCS did not receive any comments relating to the NPRM.

FMCS is adopting the final rule with two significant changes from that which was proposed. The final rule withdraws its proposed revision to § 1401.35 which would have transferred some of the FOIA responsibilities from the FMCS Deputy Director to the Chief of Staff. It was determined that the current structure in which the FMCS Deputy Director is the FOIA Appeals Officer is appropriate for the Agency. The final

rule also revises the language in § 1401.36(b)(4) of the proposed rule to reflect that waiver appeals should be filed with the FMCS Deputy Director instead of the Chief of Staff, as proposed by the NPRM.

List of Subjects in 29 CFR Part 1401

Administrative practice and procedure, Freedom of information.

For the reasons stated in the preamble, FMCS amends 29 CFR Part 1401 as follows:

PART 1401 -- PUBLIC INFORMATION

1. The authority citation for Part 1401 continues to read as follows:

Authority: § 202, 61 Stat. 136, as amended; 5 U.S.C. 552.

2. Revise § 1401.20 to read as follows:

§ 1401.20 Purpose and scope.

This subpart contains the regulations of the Federal Mediation and Conciliation Service providing for public access to information under the Freedom of Information Act, 5 U.S.C. 552. It is the policy of the FMCS to disseminate information on matters of interest to the public and to disclose upon request information contained in Agency records insofar as such disclosure is compatible with the discharge of its responsibilities and the principle of confidentiality and neutrality of dispute resolution by third party neutrals.

3. Amend § 1401.21 by revising paragraphs (c), (d), and (e) to read as follows:

§ 1401.21 Information policy.

* * * * *

(c) FMCS maintains a public reading room that contains the records required by the FOIA to be made readily available for public inspection and copying. FMCS shall maintain and make available for public inspection and copying a current subject-matter index of its reading room records. Each index shall be updated regularly, at least quarterly, with respect to newly included records. FMCS shall also make reading room records created on or after November 1, 1996, available electronically through FMCS's World Wide Web Site (which can be found at <http://www.fmcs.gov>)

(d) Records or documents prepared by FMCS for routine public distribution, e.g., pamphlets and brochures, will be furnished upon request to Office of the Director of Public Affairs, Federal Mediation and Conciliation Service, 2100 K Street, N.W., Washington, D.C. 20427, as long as the supply lasts. The provisions of § 1401.36 (fees) are not applicable to such requests except when the supply of such material is exhausted and it is necessary to reproduce individual copies upon specific request.

(e) All existing FMCS records are subject to disposition according to agency record retention schedules and General Records Schedules promulgated by the National Archives and Records Administration.

4. Revise § 1401.22 to read as follows:

§ 1401.22 Partial disclosure of records.

(a) If a record contains both disclosable and nondisclosable information, the nondisclosable information will be deleted and the remaining record will be disclosed unless the two are so inextricably intertwined that it is not possible to separate them.

(b) Records disclosed in part shall be marked or annotated to show both the amount and the location of the information deleted and the applicable exemption.

§ 1401.24 [Removed]

5. Remove § 1401.24
6. Revise § 1401.31 to read as follows:

§ 1401.31 Filing a request for records.

(a) Any person who desires to inspect or copy an Agency record should submit a written request to the Office of the General Counsel, Federal Mediation and Conciliation Service, 2100 K Street, N.W., Washington, D.C. 20427. The envelope [or cover sheet] should be marked “Freedom of Information Act request.” Electronic mail requests should be sent to foia@fmcs.gov.

(b) Each request should reasonably describe the records being sought, so that the records requested may be located and identified. If the description is insufficient to locate the requested records, the officer processing the request will notify the requester and ask for additional information.

§ 1401.32 [Amended]

7. Amend § 1401.32 by removing the words “Legal Services Office” in the first sentence of paragraph (b) and adding in their place “Office of the General Counsel”.
8. Amend § 1401.34 as follows:
 - A. Revise paragraphs (a) and (b) introductory text;
 - B. Remove paragraphs (b)(3) and (4);
 - C. Revise paragraph (c);
 - D. Revise the paragraph designation of the second paragraph “(b)” to read “(d)” and revise correctly redesignated paragraph (d); and
 - E. Add paragraphs (e) and (f).

The revisions and additions read as follows:

§ 1401.34 Time for processing requests.

(a) All time limitations established pursuant to this section shall begin as of the time a request for records is received by the Office of the General Counsel.

(b) The officer or employee responsible for responding to the request shall, within twenty (20) working days following receipt of the request, respond in writing to the requester, determining whether, or the extent to which, the Agency shall comply with the request.

* * * * *

(c) Where the time limits for processing a request cannot be met because of unusual circumstances and FMCS determines to extend the time limit on that basis, FMCS will, as soon as practicable, notify the requester in writing of the unusual circumstances and the date by which the processing can be expected to be completed. Where the extension is for more than 10 working days, FMCS will provide the requester with an opportunity either to modify the request so that it may be processed within the time limits or to arrange an alternative time period for processing the request or a modified request. If FMCS reasonably believes that multiple requests submitted by a requester, or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances, and the requests involve clearly related matters, they may be aggregated.

(d) If any request for records is denied in whole or in part, the response required by paragraph (b) of this section shall notify the requester of the denial. Such denial shall

specify the reason and also advise that the denial may be appealed to the Office of the FMCS Deputy Director as specified in § 1401.35. In addition, such denial shall include an estimate of the volume of records or information withheld, in numbers of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable estimation.

(e) FMCS offices may use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of work and or time needed to process the request. A person making a request that does not qualify for the fastest multitrack processing should be given an opportunity to limit the scope of the request in order to qualify for faster processing.

(f) Requests and appeals will be taken out of order and given expedited processing in cases where the requester demonstrates a compelling need.

(1) Compelling need means:

(i) Circumstances in which failure to obtain copies of the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if the request is made by a person primarily engaged in disseminating information.

(2) A requester seeking expedited processing should so indicate in the initial request, and should state all the facts supporting the need to obtain the requested records

quickly. The requester must also certify in writing that these facts are true and correct to the best of the requester's knowledge and belief.

(3) Within 10 calendar days of its receipt of a request for expedited processing, FMCS will notify the requester of its decision. If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

9. Amend § 1401.36 as follows:

A. Revise paragraphs (a)(2) through (4), (b)(1)(i), (ii), and (iv), (b)(2)(ii), (b)(3)(v), and (b)(4) ; and

B. Remove the word “the” between “forgoing” and “scheduling” and add the words “other than those related to arbitration” between “services” and “which” in paragraph (b)(2)(i).

The revisions read as follows:

§ 1401.36 Freedom of Information Act fee schedules.

(a) * * *

(2) Search means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

(3) Duplication refers to the process of making a copy of a document necessary to respond to a FOIA request. Copies may be in various forms including machine-readable

documentation (e.g. magnetic tape or disk) among others. A requester's specified preference of form or format of disclosure will be honored if the record is readily reproducible with reasonable efforts in the requested form or format.

(4) Review refers to the process of examining documents located in response to a request that is for commercial use, to determine whether a document or any portion of any document located is permitted to be withheld. It includes processing any documents for disclosure to the requester, e.g., doing all that is necessary to excise them or otherwise prepare them for release. It does not include time spent resolving general legal or policy issues regarding the applicability of particular exemptions or reviewing on appeal exemptions that are applied. However, records or portions withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review is assessable.

* * * * *

(b) * * *

(1) * * *

(i) Clerical time. For each one-quarter hour or portion thereof of clerical time, \$4.00.

(ii) Professional time. For each one-quarter hour or portion thereof of profession time, \$10.00.

* * * * *

(iv) Computer time. For computer searches of records, requestors will be charged the direct costs of conducting the search (as provided in paragraph (b)(3)(i) of this

section), although certain requestors will be charged no search fee (as provided in paragraphs (b)(3)(ii) and (iii) of this section), and certain other requestors will be entitled to the cost equivalent of two hours of manual search time without charge (as provided in paragraph (b)(3)(iv) of this section). These direct costs will include the cost of operating a central processing unit for that portion of operating time that is directly attributable to the searching for responsive records, as well as the costs of operator/programmer salary attributable to the search. Computer time expressed in fractions of minutes will be rounded to the next whole minute.

* * * * *

(2) * * *

(ii) For those matters coming within the scope of this regulation, the FMCS will look to the provisions of the guidance published by in the Office of Management and Budget's Uniform Fee Schedule and Guidelines (available at <http://www.whitehouse.gov/omb/inforeg/infopoltech.html>) and the Department of Justice Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (available at http://www.usdoj.gov/04foia/04_7.html) for making such interpretations as necessary.

(3) * * *

(v) In no event shall fees be charged when the total charges are less than \$14.00, which is the Agency cost of collecting and processing the fee itself. If the request is expected to involve an assessed fee in excess of \$14.00, the response shall specify or estimate the fee involved before the records are made available.

(4) Waiver or reduction of charge. A fee waiver must be requested at the same time that a request for records is made. The requester should provide an explanation of why the waiver is appropriate. If the request for a waiver or reduction is denied, the denial may be appealed to FMCS Deputy Director. In the appeal letter the requester should discuss whatever reasons are given in the denial letter. Documents may be furnished without charge or at reduced levels if FMCS determines that disclosure of the information is in the public interest; that is, because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

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§ 1401.37 [Removed]

10. Remove §1401.37.

Dated: October 24, 2012

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